

Colonel James Lockhart, otherwise Rofs, - - Appellant.

Alexander Rofs of Pitcalny, Esq; and his Trustee } Respondents.
David Rofs Writer in Edinburgh, -

The Respondents C A S E.

THE Estate of *Balnagown* was antiently Part of the Earldom of *Rofs*.

THE *William* Earl of *Rofs* Brother-in-Law to *Robert* the Second, King of *Scotland*, settled the Lands and Estate of *Balnagown* on his Brother *Hugh Rofs* and his Heirs Male, which Grant was confirmed by a Charter from the King.

The Limitation to Heirs Male was continued in the subsequent Investitures for several hundred Years downwards, and the Estate was all along possessed by Heirs Male lineally descended from the said *Hugh Rofs*.

Particularly by Charter in the Year 1615, the Estate of *Balnagown* was granted to *George Rofs* then of *Balnagown* and to his Son *David*, and to the Heirs Male of their Bodies; whom failing, to *David Rofs* of *Pitcalny*, the Respondent's Ancestor, Nephew to the said *George Rofs*, and to the Heirs Male of the said *David*'s Body; whom failing, to the Heirs Male whatsoever of the Family of *Balnagown*.

George Rofs of *Balnagown* died in the said Year 1615, and he was succeeded by his Son the said *David*, called *David Rofs* the First of *Balnagown*, who died in the Year 1620, leaving for his Successor an only Son *David* the Second of *Balnagown*, then an Infant.

It appears, and there is Evidence in this Cause, that at this early Time, about the 1620, during the Infancy of the said *David* the Second, a Scheme had been laid for procuring to the then Lord *Rofs*, though he had no Connection with *Rofs* of *Balnagown*, by Blood, Kindred, or otherwise than as using the same surname, a gratuitous Right of Succession to the Estate of *Balnagown*, upon the Failure of the said *David* the Infant, and the Heirs Male of his Body, to the Prejudice and Exclusion of the lawful and rightful Heirs Male of the Family, to whom the Estate had been limited for Ages.

Upon the 28th January 1619, one *Alexander Lindsay* obtained an Apprising of the Estate of *Balnagown* for Payment of a Debt of about 200*l.* Sterling, upon which he took out a Charter, and conveyed the Apprising with the Lands therein contained to *William Rofs* of *Annat*, who executed a Deed in the Nature of a Defeazance, declaring the said Lands and Apprising to be under perpetual Reversion and Redemption by *David Rofs* of *Balnagown* and his Heirs Male, upon Payment of 200*l.* Sterling. This Grant of Reversion was entered in the proper Record, and thereby the Apprising became redeemable for ever by the Heirs Male of the Family upon Payment of 200*l.*

Upon the 15th July 1622, the then *James* Lord *Rofs* obtained from the said *Alexander Lindsay*, and his Assignee the said *William Rofs*, a Conveyance of *Lindsay*'s Apprising aforesaid, and was thereupon infeoffed.

James Lord *Rofs*, upon a Recital that he had received full Payment of the Sums in the aforesaid Apprising, conveyed the same to *David Rofs* the second of *Balnagown*, and the Heirs Male of his Body; which failing, to return to the Lord *Rofs*, his Heirs and Assigns.

Alexander Lindsay, notwithstanding he had been divested of the aforesaid Apprising in Manner above recited, and the Apprising had been paid and extinguished, granted a new Procuratory, for resigning the Estate Apprised, in Favours of *William* Lord *Rofs*, eldest Son of the said *James* Lord *Rofs*; whereupon a Charter of Apprising was taken out, and Lord *William* infeoffed, and he thereupon executed a Disposition of said Apprising to *David Rofs* the Second of *Balnagown*; and the said *William* Lord *Rofs* having died, his Brother *Robert* Lord *Rofs* made a new Conveyance of the Apprising, and thereupon a Charter of Apprising was taken out, containing a Grant of the Estate to *David Rofs* the Second of *Balnagown*, and the Heirs Male of his Body; which failing, to return to *Robert* Lord *Rofs* his Heirs and Assigns.

It does not appear, that any subsequent Title, in the Person of any one of the Family of *Balnagown*, was connected with, or that any Title was ever made up to, or under this Charter of apprising, or Mesne Conveyances thereof, or that any Use whatsoever was made thereof, as a Title, or Investiture of the Estate. There is not any Evidence in this Cause, that ever there was any Privy on the Part of the said *David Rofs* the second of *Balnagown*, to the inserting of the abovementioned Clause of Return to Lord *Rofs*, or that the said *David Rofs* ever accepted or made any Use of the Conveyances and Charter above recited, which Lord *Rofs* had made and passed, of the Estate of *Balnagown*, with a Clause of Return to himself, his Heirs, and Assigns. But it does appear, that the said Clause of Return has all along, from the Date thereof, downward, for one Hundred Years, or more, been disregarded, neglected, overlooked, and relinquished, not only by the Family of *Rofs* of *Balnagown*, but also by Lord *Rofs*'s own Family: Insomuch, that if it could be supposed to have been originally effectual to alter the antient Investitures of the Estate, and to exclude the Limitation to

Heirs male, it must have entirely lost its Force by Length of Time : It was entirely disregarded by *Ross of Balnagown*, for the Titles of the Estate of *Balnagown*, subsequent to the said Clause of Return, and all Conveyances taken relative to such subsequent Titles, were taken and limited to *Ross of Balnagown*, and his Heirs male, agreeable to the former Investitures, without a Word of any Return, Right, or Limitation to Lord *Ross*, his Heirs, or Assigns, and without any Pretension set up on the Part of Lord *Ross*, or of any Person claiming under him : And supposing the said Clause of Return to have had any Force originally, it did not disable *David Ross* the second of *Balnagown*, or any other Heir of that Family, vested with the Estate, to alter the Course of Succession laid down by the Clause of Return, and to re-establish the ancient Limitation to the rightful Heirs male of the Family ; and this was done accordingly, by a Variety of subsequent Titles and Conveyances as will be seen from what is to be hereafter set forth.

1657, July 22. Upon the 11th of July, 1657, *David Ross* of *Balnagown*, the third of that Name, being a Minor, under Age, *David Ross* of *Pitcalny* was found, by a Jury of the most eminent Gentlemen of the Country, upon Oath, to be the nearest Agnat (that is, the nearest Relation by the Father) to the said *David Ross* the third of *Balnagown*, and the Person who would succeed to him in case of his Death without Issue ; and he was accordingly served and retoured Tutor (Guardian) to the Minor, agreeable to the Law and Practice of Scotland in such Case.

1657, Oct. 11. Upon the 11th of October, 1657, *David Ross* the third of *Balnagown*, was served and retoured Heir male to his Father, in the Estate of *Balnagown*, without any Reference to the Charter of 1648, or any Notice taken thereof.

1666. In the Year 1666 *David* the third married Lady *Anne Stewart*, Sister to the Earl of *Murray*, and by the Marriage Articles, several Parts of the Estate of *Balnagown* were settled upon the Heirs male whatsoever of the said *David*.

1667, Aug. 19. Upon the 19th of August, 1667, *David* the third took out a Charter, from the Bishop of *Ross*, of such Parts of the Estate of *Balnagown* as held of the Bishop, granting the same to the said *David Ross* and his Heirs male.

The Marriage between *David* the Third of *Balnagown* and Lady *Anne Stewart* subsisted several Years without Issue. The Lady, being the Sister of *Alexander* Earl of *Murray*, Secretary of State to King *James* the Second, and a Man of great Note and Power in those Days, had by herself, and her Friends, an unlimited Influence over her Husband, who being a Man of a weak Understanding, and Facility of Temper, easy to be imposed upon by those who had an Opportunity to gain an Ascendant over him, thereby became a Prey to such as were disposed to take Advantage of his Weakness.

The Estate was upwards of 1000 l. Sterling of yearly Rent, subject to Mortgages to the Extent of about 5000 l. Sterling, and to some Apprisings for inconsiderable Sums. But the Woods upon these Lands were much more than sufficient to redeem the Mortgages, and to clear the Estate of every Incumbrance.

1685, May 22. *David Ross* of *Balnagown* was made to execute a most extraordinary Deed of Settlement of his whole Estate. He recites that "*Alexander* Earl of *Murray*, in Name and Behalf of *Francis Stewart*, his youngest Son, had advanced and paid to *Balnagown* the Sum of 15000 Merks Scots (833l. 6s. 8d. Sterling) wherefore, and for certain other Causes and Considerations him thereto moving, the said *David Ross* became bound and obliged to resign his whole Lands and Estate of *Balnagown* to himself in Liferent, and to the said *Francis Stewart*, and the Heirs Male of his Body, in Fee. Remainder to the Heirs Male to be procreated of Lady *Anne Stewart*'s Body, in any other Marriage; with certain Remainders over." Proviso: "That the said Estate shall be redeemable from the said *Francis Stewart*, and his Heirs Male and Assigns aforesaid, within the Space of Two Years after the said *David Ross*'s Decease, by the Heirs Male of his own Body, by Payment or Confignation of an Angel of Gold, together with the aforesaid Sum of 15000 Merks Scots, and annual rent thereof, and of all other Sums which the said Earl or his said Son should happen to pay or advance to *Balnagown*, or his Creditors with annual rent thereof."

This Deed contains many other Clauses and Provisos equally irrational and absurd: But, from the general Complexion thereof, the following Absurdities are evident. First, That for a Sum less than one Year's Rent, and which Sum does not appear to have been truly advanced, *David Ross* of *Balnagown* was thereby made to divest himself of the Fee of his Estate, and to reduce himself to the State of a naked Liferenter, without having it in his Power to charge it with one Farthing of Debt on any Cause or Occasion however necessary and just. Secondly, That he was thereby made to disinherit his whole Kindred and Relations, the natural and lineal Representatives of this ancient Family. Thirdly, That his own Daughters were thereby for ever excluded from the Succession. Fourthly, That the Faculty of Redemption thereby granted to the Heirs Male of *David Ross* of *Balnagown*'s Body was limited and confined to the Space of two Years after his Death. Fifthly, that the Fee of the Estate was thereby granted, first, to Mr. *Francis Stewart*, a younger Son of the Earl of *Murray*, an absolute Stranger to the Family of *Balnagown*, and the Heirs Male of his Body, Remainder to the Heirs Male to be procreate of Lady *Anne Stewart*'s Body of any after Marriage. And in the last Place, That *David Ross* of *Balnagown* was thereby taken bound in absolute Warranty of the Grant, under certain Exceptions, particularly of the Lady's Liferent, and of the Mortgages affecting Part of the Estate; so that every Circumstance of the Case, and the Nature of the Thing speaks, that the Deed was elicited from the Grantor by the Influence and Address of the Lady and her Friends.

The Deed of 1685 is not the only Instance of the Influence Lady *Anne Stewart* and her Friends had over her Husband. By her Marriage Contract, she was provided to a Jointure of about 2000 Merks per Annum; this was gradually increased by repeated Grants, from Year to Year, till she had secured herself in the Liferent of her Husband's whole Estate, excepting such Parts thereof as had been mortgaged.

1686, Dec. 16. In order to fortify the Deed of Settlement of 1685, an Obligation is taken from the said *David Ross*, wherein he declares, upon his Honour, and swears upon his Soul and Conscience, that he had not done

done any Deed, and that he should not do any Fact or Deed, in Prejudice of the aforesaid Right and Disposition, and that he should grant and subscribe any other Deed or Writing that the said noble Earl, or his Son, should require for the further Security of the aforesaid Disposition. Accordingly the Earl of Murray not relying on a direct Conveyance from so weak a Man as *Balnagown* was, took from him a Bond for 36,000 Merks (2000 l. Sterling) under a Defeazance from the Earl declaring the Bond was granted for strengthening the Tailzie made by *Balnagown* to Mr. Francis Stewart the Earl's Son.

Thus Matters stood when, about the Year 1690, the then *William Lord Ross*, who was not the Heir whatsoever, or Assignee of that Lord *Ross* to whom the pretended Right of Return was laid down in the Charter of Apprising of 1648, and who, any more than that Lord *Ross* had no Relation or Connection with *Ross* of *Balnagown* further than carrying the same Surname, formed a Scheme to defeat the Settlement of 1685, and to secure the Estate to himself and his Family.

This Scheme was conducted with great Art and Address; but it appears, from a Variety of Documents which have been lately discovered, particularly from original Letters of Correspondence, that Lord *Ross* begun his Scheme, by suggesting to *David Ross* of *Balnagown* Sentiments of Disgust at the Settlement he had made on Mr. Francis Stewart, as highly prejudicial to his own Interest, and that of his family: That the like Suggestions were made to several of the Surname of *Ross*, the Cadets or Descendants of *Balnagown's* Family, who were prevailed upon to enter into Lord *Ross's* Views, and to remonstrate against the Settlement of 1685, and to solicit a new Settlement on Lord *Ross*; that such of the Name of *Ross* and others, who had most of *Balnagown's* Confidence, and the Direction of his Affairs, were, by Promises of Rewards, gained over by Lord *Ross* to betray the Trust and Confidence that *David* of *Balnagown* had reposed in them; and that a reverend Clergyman in those Parts, who had been in great Favour with Lady *Anne Stewart*, having, by Promise of Rewards, become principal Actor in effectuating Lord *Ross's* Scheme, contributed greatly, by his Influence upon Lady *Anne Stuart*, to get *David Ross* of *Balnagown* to abandon and throw up the Settlement of 1685, and to consent to a new Settlement to Lord *Ross*; and that those Promises and Sollicitations were enforced by the specious Pretences of strengthening the presbyterian Religion in those Parts, and aggrandizing the whole Name of *Ross* by the Power which Lord *Ross* would have, and by the good Offices and Favours he would confer upon them, after being possessed of the Estate of *Balnagown*.

Accordingly, by Deed of this Date, *David Ross* of *Balnagown* and Mr. Francis Stewart for their respective Rights and Interests, in Consideration of 63,000 Merks Scots, (3500 l. Sterling) paid by Lord *Ross* to Mr. Francis Stewart, and of an Obligation of Relief, of the same Date, granted by Lord *Ross* to Mr. Francis Stewart, for relieving him of the Consequences of the Settlement of 1685, "Became bound and obliged to resign not only the whole Estate of *Balnagown*, but all other Lands which the said *David Ross* might thereafter purchase or acquire during his Life, or which should happen to pertain to him the Time of his Decease, in Favours of the said *David Ross* himself in Liferent, and the said *William Lord Ross*, and the Heirs Male of his Body in Fee; Remainder to any other Person that *David Ross* should nominate by a Writing under his Hand at any Time in his Life." Proviso, "That the same should be redeemable from the Lord *Ross* and his forefairs within Two Years after the Decease of the said *David Ross* of *Balnagown*, by the Heirs Male lawfully to be procreated of his Body, by Payment or Consignation of a Guinea of Gold, and of the aforesaid Sum of 63,000 Merks Scots and Interest thereof, and of all other Sums which the said Lord *Ross* or his Heirs should happen to pay to the said *David Ross* or his Creditors, with Interest from the Time of Advancement." And this Disposition contains the like Clause as the Deed of 1685, of absolute Warranty on the Part of *Balnagown*, with the like Exceptions of Lady *Anne Stewart's* Liferent, and of the Mortgages affecting the said Estate; which, by the Redemption of some of these Mortgages, were then reduced to a third less than what they amounted to in the Year 1685. But Lord *Ross* not chusing to rely on any direct Conveyance from *Balnagown*, took also from him a Bond for 16000 l. Scots (1333 l. 6 s. 8 d. Sterling) of the same Date with the Disposition, and, a few Days after, another Bond for 26000 l. Scots, (2133 l. 6 s. 8 d. Sterling) both under Back-bond or Defeazance by Lord *Ross*, declaring that no Money was advanced, but that the Bonds were granted only for strengthening the Disposition to Lord *Ross*.

There is this material Difference between the two Deeds 1685 and 1706, though both were elicited and obtained by the same undue Means, that the Settlement 1685 was limited and confined to the Estate of *Balnagown*, as it then stood; so that all after Acquisitions and Purchases, if any such there had been, would have remained with *Balnagown*, descendible to his right Heirs, or disposable by him at Pleasure; but by the Deed of 1706, for the trifling Sum of 63,000 Merks, paid by Lord *Ross* to Mr. Francis Stewart without any Consideration whatever given to *Balnagown* himself, *Balnagown* was not only induced to concur in a new Conveyance of that Estate, with absolute Warranty, to Lord *Ross* and the Heirs Male of his Body, thereby reducing himself to the State of a naked Liferenter, but, which is still more extraordinary, was made to settle and dispoise every other Estate which he should thereafter acquire or succeed to, or which should pertain to him at his Death, to Lord *Ross*, and the Heirs Male of his Body, with a Faculty of Redemption to the Heirs Male of *Balnagown's* Body, and none other. And that only within the Space of Two Years after *Balnagown's* Death. So that every Absurdity arising from the Settlement of 1685, is chargeable with equal Force upon the Deed of 1706.

Matters did not rest here; the Settlement of 1706, went no further than to grant the Fee to the Heirs Male of Lord *Ross's* Body, whereby, upon their Failure (and which Event now exists) the Estate must have returned to *David Ross* of *Balnagown* himself and his right Heirs; therefore in order to strip *David Ross* and his right Heirs even of this Chance, he was, of this Date, prevailed upon without any valuable Consideration, to execute a new Settlement of his Estate on Lord *Ross*, and the Heirs Male of his Body in Fee; Remainder to the youngest Sons of Lord *Ross's* three Daughters in their Order of Seniority, and the Heirs Male of their respective Bodies; Remainder to Major-General *Ross*, Brother to the Lord *Ross*, and the Heirs Male of his Body; Remainder to any other Person *Balnagown* should nominate; Remainder to Lord *Ross's* Heirs and Assigns whatsoever.

There still remained one Subject, which was too valuable to allow *David Ross* to retain. By Contract of Sale with certain Merchants he had recently sold twelve Thousand Fir Trees, at the agreed Price of 5000 l. Sterling. By Deed of this Date he was made to assign the Contract to Lord *Ross*.

And

June 1708.

And by another Deed, of this Date, he was made to convey and dispoſe to Lord Roſs the whole Woods upon his Eſtate.

About the Beginning of the Year 1710, a new Project was ſet on Foot, in Conſequence of a Treaty between Lord Roſs and his Brother General Roſs, for procuring a fourth Conveyance and Settlement of this Eſtate directly on the General himſelf, upon ſuch Conſideration to be paid by the General to his Brother, the Lord Roſs, as they had agreed upon: For if they could but agree between themſelves, Experience had proved, that *Balnagown's* Conſent would be obtained by proper Inſtruments without any Conſideration to be given him.

25 Dec. 1710. &
5 April 1711.

Accordingly, by Deed of theſe Dates executed by Lord Roſs at *Edinburgh*, upon the 15th of December, 1710, and by *David* of *Balnagown*, no earlier than the 5th of April, 1711, "The ſaid William Lord Roſs, with Conſent of *George* Maſter of Roſs his Son, and *David* Roſs of *Balnagown*, for their reſpective Rights and Interests, upon a Recital that General Roſs had advanced and paid to the ſaid William Lord Roſs, his Brother, the Sum of 5500 l. Sterling, annuallized and diſpoſed, to and in Favour of the ſaid General *Charles* Roſs and his Heirs and Assigns whatſoever veritably, and irredeemably, the Lands and Eſtate of *Balnagown*, reſerving to *Balnagown* himſelf his Liferent thereof, and to Lady *Anne* Stewart her eventual Liferent to ſuch Parts thereof to which ſhe ſtood provided; and *Balnagown* becomes thereby bound and obliged to deliver up to the ſaid General *Charles* Roſs and his aforeſaids, an Inventory of the whole Writings and Titles of the ſaid Lands and Eſtate, and ſo many of the Writings themſelves as will make a ſufficient Progreſs for forty Years, and to make the original Title-Deeds forthcoming and patent to them whenever they ſhall have Occaſion therefore."

By this Train of Deeds, *David* Roſs of *Balnagown* was gradually ſtripped of his Eſtate, as well what he then poſſeſſed, as what he ſhould afterwards acquire, or ſucceed to, for the trifling Sum of 15000 Merks Scots, ſaid to have been paid to him by the Earl of *Murray* in the Year 1685, but which does not appear to have been paid. By the Settlement of 1685, the Fee of the Eſtate was diſpoſed to Mr. *Francis* Stewart, and the Heirs Male of his Body; Remainder to the Heirs Male of Lady *Anne* Stewart's Body of any ſubſequent Marriage. The ſubſequent Remainders were to the Heirs Male of *Balnagown's* own Family, and by Virtue of the total Liferent reſerved to *Balnagown* himſelf, he had the abſolute Power of cutting, ſelling and diſpoſing of the valuable Woods upon his Eſtate.

By the Settlement 1706 he is made to execute a new Grant to Lord Roſs and the Heirs Male of his Body; Remainder to ſuch other Heirs as he himſelf ſhould appoint, not only of the ancient Family Eſtate, but of all other Lands and Heritages, which at any Time in his Life he ſhould acquire or ſucceed to; and the valuable Conſideration, for ſo extraordinary a Grant, was 63000 Merks Scots, paid by the Lord Roſs to Mr. *Francis* Stewart, not a Penny to *Balnagown* himſelf — By the Deed of 1707, he is made to extend the new Grant to the younger Sons of Lord Roſs's three Daughters, Remainder to General Roſs and the Heirs Male of his Body — By the other Deeds in 1707 and 1708, he makes over to Lord Roſs the Contract of Sale for the twelve Thouſand Trees, and the whole other Woods growing on ſaid Lands — And to conclude the whole, by the Deed 1711, he is made to execute an abſolute irredeemable Diſpoſition, of the Eſtate, to General Roſs, his Heirs and Assigns whatſoever, in Conſideration of the General's making Payment to Lord Roſs of 5500 l. Sterling, a Sum not equal to one Third of the Value of the Woods, independent of the Lands themſelves.

It appears from the Letters of Correſpondence wrote upon the Occaſion, that *Balnagown*, weak and eaſy as he was, had been refractory to execute the Diſpoſition to General Roſs; that he was not prevailed with to execute the ſame till he was on Death-bed and in *Extremis*, when Roſs of *Eaſterſearn*, who had been the Truſtee and Conſident both of William Lord Roſs and the General, in obtaining all the Deeds from the weak Man under the Mask of Friendſhip, made his laſt and utmoſt Effort, and thereby got *David* Roſs to ſign.

7 Dec. 1710.

General Roſs, of this Date, wrote to Roſs of *Eaſterſearn*, referring to the Advice he ſhould receive from *John* Chriſtie, the General's Agent.

15 Dec. 1710.

Accordingly, *John* Chriſtie, by Letter of this Date, accompanying the aforeſaid Diſpoſition, which was transmitted to Roſs of *Eaſterſearn*, in order that he might prevail with *Balnagown* to execute the ſame, among other Particulars, gave Roſs of *Eaſterſearn* this remarkable Inſtruction, "To make Enquiry where any old Debts or Appriſings of *Balnagown's* could be procured; and if none ſuch could be found, that *Balnagown* ſhould look out thoſe formerly paid and retired, and upon giving up the Diſcharges formerly granted, ſhould procure Conveyances thereof in the Names of Truſtees: This Point requires both Secrecy and good Management, and can be recommended to none but one of your Prudence and Zeal for the Standing of the Family."

Roſs of *Eaſterſearn* accordingly acted his Part with Dexterity and Addreſs; *Balnagown* ſtill declined to execute the Diſpoſition to the General; *Eaſterſearn* ſuggeſted certain Articles or Terms to be performed on the Part of the General, over and above thoſe contained in the Diſpoſition already executed by Lord Roſs; and that till thoſe Articles ſhould be performed, on the Part of the General, the Diſpoſition, tho' ſigned by *Balnagown*, ſhould remain depoſited in the Hands of Sir William Gordon of *Dalſolly*, another Conſident of the General. The Articles thus ſuggeſted by *Eaſterſearn* were in Reality of no Advantage or Import to *Balnagown*, but had the deſired Effect of amuſing the weak Man, and of making him believe *Eaſterſearn* to be his firm Friend.

Articles of Depoſition were accordingly made out in the Hand-writing of *Eaſterſearn*, and were ſubſcribed by *Balnagown*, and Sir William Gordon the Depoſitary, upon the 5th of April 1711. This Stratagem of Roſs of *Eaſterſearn* by the Articles of Depoſition, had the deſired Effect. *Balnagown* of the ſame Date, executed the Diſpoſition to General Roſs, and it was depoſited in Sir William Gordon's Hands.

David Roſs of *Balnagown* died in a few Days after executing the laſt-mentioned Deed to General Roſs; and Sir William Gordon delivered up the Diſpoſition to the General. It appears from the Letters of Correſpondence between General Roſs and Roſs of *Eaſterſearn*, that the latter, by particular Inſtructions from the

the former, did possess himself of the Charter-Chest and whole Title-Deeds of the Estate, which till then had remained with *Balnagown* himself.

In this Manner it was, that General *Ross* having purchased his Brother's *Bargain*, as he himself expresses it in one of his Letters, by giving his Brother 2000 l. Sterling of Profit, did, upon the Death of *Balnagown*, enter upon the Estate, and possess himself of the whole Title-Deeds: Though it will be shown on the Part of the Respondent, that, in Place of General *Ross*'s paying 2000 l. or any Money for the Bargain, or in place of his paying a valuable Consideration, besides getting the Estate of above 1000 l. a Year of settled Rent, he was some Thousand Pounds in Pocket, by what he called *the Bargain*.—After getting Possession, he obtained Conveyances from sundry Persons of old Debts and Apprisings upon the Estate, which had formerly been paid by *Balnagown* himself, and had been discharged, and upon such Debts, as well as upon the fictitious Bonds which had been taken by Lord *Ross* from *Balnagown*, the General took an Adjudication of the Estate against the Respondent's Father, as the Heir of the Family.

The Respondent's Father, was of an indolent inactive Disposition; he had no Opportunity to discover the Secrets of the above Transactions, or the Fraud and Circumvention under which the several Deeds had been obtained.

General *Ross*, who had no Issue of his own Body, made a Tailzie of the Estate, and thereby settled the same on his Great-Nephew *Charles Ross*, second Son to *George Lord Ross*, and the Heirs Male of his Body, with many Remainders over, under strict, prohibitory, irritant and resolute Clauses. The General died in the Year 1732, and *Charles Ross* entered upon the Estate, under the General's Tailzie.

The Respondent, *Alexander Ross* of *Pitcalny*, the Heir Male of *David Ross* of *Balnagown*, having recovered many original Letters and Writings, and thereby discovered the whole Combination, Fraud and Circumvention, by which the Estate of *Balnagown* was taken from the right Owners, he resolved to sue for Justice.

He granted a Trust Bond to the other Respondent *David Ross*, who thereupon led an Adjudication against him as charged to enter Heir to *David Ross* of *Balnagown* last deceased, his Father, *David Ross* the second of *Balnagown*, his Grandfather, *David* the first, and his Great-grandfather *George Ross* of *Balnagown*, and other his Ancestors; and upon that Title, he brought an Action of Reduction, Improbation, and Declarator in the Court of Session, against the aforesaid *Charles Ross* and others, having Interest in, or Title to claim under all, or any of the above-recited Deeds, or under any Bonds, Inhibitions, apprisings, Adjudications, Dispositions, Charters, Infeoffments, and other Rights and Diligences affecting the said Estate, of all which the Pursuer was well intitled to call and insist for Exhibition and Production, and to extricate the Estate of all Incumbrances; and the general Reasons of Reduction insisted upon on the Part of the Pursuer were, the Facility and Weakness of *David Ross*, the Grantor of the Deeds, particularly above recited, the Irrationality and Absurdity thereof, and the Enorm Lesion which he and his whole Family thereby sustained, and the Fraud and Circumvention by which the Deeds had been elicited and obtained.

The Lords of Session, by Interlocutor of this Date, "Sustained the Pursuer's active Title, and assigned a Day to the Defendants, to satisfy the Production of Writings craved by the forelaid Summons.

Charles Ross, who was then in possession of the Estate, appeared to the Suit, and took upon him the Burden of the Defence; and after sundry Proceedings before the Lord *Dun*, Ordinary, unnecessary to be recited, the Respondent exhibited a Condescendence, or Particular, of the Facts and Circumstances which he offered to prove in support of his general Reasons of Reduction. He therein set forth, that *David Ross* of *Balnagown* was a weak Man, was held and reputed to be so by all who knew him, and was under the Influence of his Wife, and Mr. *Stewart*, the Clergyman.—He set forth the Irrationality of the several Deeds in question, and the Absurdity of several Parts and Clauses thereof, and the Fraud, Imposition, and Lesion thereby put upon *David Ross* and his Family: And then he set forth, that *William Lord Ross* engaged certain Gentlemen of the Name of *Ross*, by Promises of Rewards, and of making them great, to persuade *David Ross* of *Balnagown* to settle his Estate on Lord *Ross*, under the Pretence of advancing the Name of *Ross* in general, as well as the Presbyterian Religion; and that the Clergy were made to engage in the Affair, particularly Mr. *William Stewart*, who undertook to bring over *Balnagown*'s Wife to Lord *Ross*'s Interest.

Answers were put in by *Charles Ross* to the above Condescendence, whereupon the Lord Ordinary took the Cause to report to the whole Court.

Informations were given in by both Parties; and as *Charles Ross*, the Defendant, had excepted to the Respondent's Condescendence, as too general, and not sufficiently explicit, with respect to the particular Facts that were meant to be proved, the Respondents, in their Information, endeavoured to remove that Exception, by a special Reference to, and Recital of, many original Letters of Correspondence which they had then happily discovered; but the Court did not, at that Time, think the said Condescendence sufficient.

On report of the Lord *Dun*, the Lords of Session, by their Interlocutor of this Date, signed the 9th of February, 1740, "found that the Pursuer, *Alexander Ross* of *Pitcalny*, as Heir Male of the deceased *David Ross* of *Balnagown*, or as having Right to the Adjudication led against him the said *Alexander*, as charged to enter Heir to the said deceased *David Ross*, by *David Ross* Writer in *Edinburgh*, has no sufficient Title to carry on this Process, in so far as concerns such Lands or Parts of the Estate of the said *David Ross*, to which the Pursuer could not succeed as Heir Male to him, and whereof the Succession is devolved to a different Series of Heirs.

"But found, that by the Charter produced, granted by the Bishop of *Ross* to the said *David Ross*, in anno 1667, the Succession of the Lands and others therein contained is devolved to the said *David Ross*, his Heirs Male; and therefore sustained the Pursuer's Title, in so far as concerns these Lands, and repelled the Defence of Prescription.

"But found the Qualifications of Fraud and Circumvention, and particularly of the Facility and Weakness of the said *David Ross* of *Balnagown*, condescended on by the Pursuer, are not sufficient for allowing a Proof, even before Answer, of the said Qualifications, after so great a distance of Time, and after

" the Death of the said *David Ross* of *Balnagown*, and of all the other Parties concerned in the Transactions now quarrelled, and remitted to the Lord *Dun*, Ordinary in the Cause, to proceed accordingly."

The first Part of the Interlocutor very properly found the general Rule or Proposition thereby established. But as the Title-deeds of the Estate, whereof General *Ross* had got Possession in manner abovementioned, were withheld by the Defendant, so that it could not appear what Parts of the Estate stood devised to Heirs male, or to a different Series of Heirs, that first Part of the Interlocutor neither had, nor could have, any other Effect than to fix and establish the general Rule or Proposition, that the Respondent's Title, under the Adjudication led against him as Heir male, was not sufficient in regard to any Part of the Estate, if such there was, that stood limited and devised to Heirs whatsoever. The Respondent therefore did not reclaim against that Part of the Interlocutor, which he had no Occasion to controvert, as it did not exclude him from any Part of the Estate which was devised to Heirs male, or was not devised to Heirs whatsoever, or to a Series of Heirs different from Heirs male.

And agreeably to the Nature of the Respondent's Right as Heir male, the second Part of the Interlocutor sustains the Respondent's Title, so far as concerns the Lands contained in the Charter of 1667, and repells the Defence of Prescription.

Notwithstanding which, the Lords of Session, by the last Part of the Interlocutor, were pleased to refuse a Proof before Answer of the Qualifications of Fraud and Circumvention, and of the Facility and Weakness of the Grantor of the Deeds in question, and of the Lesion sustained thereby.

The Respondent preferred a Petition against the last Part of the Interlocutor, and prayed to be allowed a Proof, before Answer, of the Reasons of Reduction, agreeable to the constant and uniform Practice in all Processes of the like Nature; but the Petition was refused by Interlocutor of this Date, by a Majority of one.

23 Feb. 1740.

In the following Proceedings, before the Lord Ordinary, the Respondent exhibited an additional and a more special Condescendence of the Qualifications he offered to prove in support of his general Reasons of Reduction. He therein set forth a Variety of new Facts and Circumstances, which had not been contained in his original Condescendence, and many of those new and particular Facts being in Substance set forth above, in this Case, are unnecessary to be repeated here.

29 Nov. 1741.

Charles Ross having put in his Answers to the said additional Condescendence, the Lord Ordinary, by Interlocutor of 29 November, 1741, made Avissandum to himself, with the said additional Condescendence and Answers.

30 Nov. 1741.
Interlocutor.

But the said *Charles Ross*, afraid of the Consequences of a Proof, having pleaded his Privilege of Parliament, the Lord Ordinary, by Interlocutor of 30 November 1741, "Superceded advising said Condescendence and Answers so long as the Defendant's Privilege as a Member of the House of Commons continued." By this the Respondent's Proceedings were stayed during the Residue of *Charles Ross*'s Life. He died in the Year 1745, and then the Respondent's Proceedings were stayed by the Trouble's and Disorders occasioned by the Rebellion of 1745.

After the Death of *Charles Ross*, his Father *George Lord Ross* took the Estate, and he dying soon thereafter, his eldest Son, *William*, the last Lord *Ross*, took the Estate; and he soon thereafter dying without Issue, the whole male Line of Lord *Ross*'s Family thereby became extinct.

Thereupon Sir *Alexander Gilmour*, and the Appellant, Colonel *James Lockhart*, as the next remainder Men under General *Ross*'s Tailzie of 1727, claimed the Estate of *Balnagown*, and the Respondent revived his Suit which had abated under the Circumstances already mentioned. Both Sir *Alexander Gilmour* and the Appellant appeared as Defendants to the Respondent's revived Suit, and pleaded a Stay of the Respondent's Proceedings until a Year should be elapsed from the Death of Lord *Ross*, the last Possessor, commonly called the *Annus deliberandi*.

The Court did accordingly stay the Respondent's Proceedings: But as by means of this Delay, there was an apparent hazard, that Part of the Respondent's Proofs might perish by the Death of his oldest and most material Witnesses, who had been personally acquainted with the above-mentioned *David Ross* of *Balnagown*, the Lords of Session, by repeated Interlocutors, unnecessary to be recited, as none of these are appealed against, granted Warrant for taking the Depositions of certain Witnesses to lie in *retentis*; and these Witnesses were accordingly examined.

In the mean Time the Dispute between Sir *Alexander Gilmour* and Colonel *Lockhart* was determined, and the preferable Right, as between them two, under General *Ross*'s Tailzie, was found to be with the Appellant, Colonel *Lockhart*.

27 Feb. 1756.
First Interlocutor appealed from.

Afterward the Respondent proceeded in his Suit, and insisted before the Lord *Edgfield*, Ordinary, to be allowed a Proof before Answer of his general Reasons of Reduction, in Terms of original and additional Condescendances; and to be allowed Process of Diligence against Havers for recovering the other Writings and Title-Deeds of the Estate, or any Part thereof, devised to Heirs Male: whereupon the Lord Ordinary, by Interlocutor of 27 February 1756, made Avissandum with the Condescendances, Informations, and additional Condescendances, and Answers given in for either Party, to the Lords, and granted Diligence at the Pursuer's (Respondent's) Instance against Havers, for recovering such further Rights and Titles to the Estate of *Balnagown*, or any Part thereof, which were devised to Heirs Male whatsoever.

29 July 1756.
Second Interlocutor appealed from.

The Cause having been accordingly reported, the Lords of Session, by their unanimous Interlocutor of 29 July, 1756.—"Before Answer, allowed the Pursuer, *Alexander Ross* of *Pitcalny*, (the Respondent) to prove his Reasons of Reduction, and all Facts and Circumstances which may be material for him in the Cause; and allowed the Defender, Colonel *James Ross*, to prove his Defence, and all Facts and Circumstances which may be material for him in the Cause; and allowed both Parties a conjunct Probation, all *prout de jure*; and granted Commission for taking the Examination of the Witnesses, to be reported against the 30th of November then next."

By

By Interlocutor of 4 August 1756, the Lords of Session "allowed the whole other Defenders, if they pleased to use the same, the like Proof that is allowed to Colonel *Rofs*, and granted Warrant to the Clerk of Process, to make open the Seals of those Proofs which have already been taken to lie in *retentis*, and to give all Parties concerned Inspection thereof."

Against the above recited Interlocutor of the 29th July 1756, Colonel *Rofs* preferred a Petition, and thereby prayed, "that the Lords of Session would either assaillie him with respect to all the Lands other than those contained in the Charter 1667; or if the Respondents insisted for a Diligence to recover other Titles, in order thereby to shew, that other Parts of the said Estate stood likewise devised to Heirs Male, to supercede, granting any Proof till it should appear what other Titles could be recovered upon that Diligence."

But the Lords of Session, by their unanimous Interlocutor of 11th August, 1756, Refused the said Petition, without appointing it to be answered.

The Appellant acquiesced in these Interlocutors, and in the Proof thereby granted to both Parties, for proving their several Allegations, whereby, agreeably to the uniform Practice in Cases of the like Nature, it was reserved to the Court, after the Proof should be reported, to judge what Effect and Operation it should have in the present Dispute; and in pursuance thereof, as both Parties extracted Acts and Commissions for proving, in Terms of the said Interlocutors, many Witnesses were examined by both Parties, and a Variety of Writings recovered; and as soon as a State of the Proofs could have been prepared, the whole Cause would have received the Judgment of the Court.

But as General *Rofs* had possessed himself of the Title-Deeds of the Estate, in the manner above set forth, immediately after the Death of *David Rofs* the last of *Balnagown*, and it being now *sub judice* whether the Estate belonged of Right to the Appellant or Respondent, the Respondent was advised, that he was entitled to demand Inspection of the Charter-chest of the Family of *Balnagown*; and therefore preferred a Petition, praying that such Inspection might be ordered; and to his Petition annexed a Condescendence, or Particular of various Titles of the Estate of *Balnagown* and Parts thereof (other than any of those already above recited) taken and acquired by *David Rofs* the second, and *David Rofs* the third, of *Balnagown*, from the 1647 at various Periods downwards, containing Limitations of the Estate to Heirs male.

Together with the said Petition, the Respondents produced the Marriage-articles between *David Rofs* of *Balnagown*, and Lady *Anne Stuart*, bearing Date the 15th of March, 1666; whereby the Lands of *Meickle Dallas*, and other Parcels therein mentioned, Parts of the Estate of *Balnagown*, (other than those contained in the Charter of 1667) were specially devised to the said *David Rofs* and his Heirs Male whatsoever, and also produced the above-recited Service of *David Rofs* of *Pitcalny*, the Respondent's Ancestor, in the Year 1657, as Tutor of Law to the said *David Rofs* of *Balnagown*.

The Appellant put in his Answers to the said Petition, in which Matters were greatly misrepresented, and at the same Time served an order of Appeal, after which the Court could not proceed to give Judgment upon the aforesaid Petition and Answers, or upon the Respondent's Replies to those Answers.

The Interlocutors appealed from are those of the 27th of February, 29th of July, and the 11th of August 1756; but the Respondents humbly hope these Interlocutors will be affirmed for the following, among other,

R E A S O N S :

- I. The two Interlocutors of the 27th February and 29th of July 1756, one of them granting Diligence to the Respondent for Production of Title-Deeds, the other allowing both Parties to make Proof before Answer, manifestly tend to do Justice between them, in the only Method, by which it can be attained. The Respondent's Character, as Heir Male of the Family of *Balnagown* is not disputed, but his Right to the several Estates in Question depends upon recovering the Settlements of those Estates by virtue of his Diligence. His Right to set aside the Appellant's Titles must depend on his being allowed to make out a Case of Fraud in Evidence.
- II. These Decrees are warranted not only by substantial Rules of Justice, but by the common Forms of the Court. It would be repugnant to the Ends for which Courts are instituted, and to constant Experience, if Process for producing Deeds, or for making Proofs, were refused in *Limine* to a Plaintiff, whose Case is properly alledged in Point of Law; and if the Facts be properly alledged, so as that the legal Relevancy is evident, without further Argument (as it must be in every Case of Fraud) the regular Course of the Court warrants the sending Parties to Proof before Answer; because the Judgment of the Court can be governed only by the Facts proved.
- III. It is plainly immaterial and improper to determine the Extent of the Respondent's Right as Heir Male, before any Proof is allowed upon the Question of Fraud. If he does not prove the Fraud, he can be entitled to no Part of the Estate. If he does prove it, then it will be Time enough to enquire, how much of the Estate he ought to recover, and how much the Appellant ought to retain, either by virtue of the Charter of 1648, or any other Deeds or Investitures which have changed the Succession from the Heirs Male of *David Rofs* of *Pitcalny*, or the Heirs Male whatsoever of *Balnagown*, to the Heirs or Assigns of *Robert Lord Rofs*, which last Character belongs neither to the Appellant nor the Respondent.
- IV. The Interlocutor of the 5th February 1740, did not intend to preclude the Respondent from producing Titles to the whole Estate as Heir Male. The Decree does not say, that the Respondent has no Right to insist for any Part of the Lands, except the Lands comprized in the Bishop of *Rofs*'s Charter of 1667. It only lays down a Rule, which cannot be controverted, that so far as he can support his Character of Heir Male, he may proceed; so far as the Estate stands limited to Heirs whatsoever, or Heirs General, his being Heir Male will not avail him.

V. Supposing the Interlocutor of the 5th of February 1740, affirmed by the subsequent Interlocutor of the 22d February 1740, had pronounced, that the Respondent could insist only for the Lands contained in the Bishop of Ross's Charter; and supposing that the Defects of his original Condescendence or Allegation were such, as to warrant that Part of the first Interlocutor which precludes him from entering into Proofs of Fraud; yet the additional Condescendence in June 1741, has changed the State of the Suit, and materially supplied those imagined Defects. The Prosecution of the Suit has been obstructed by Privilege, and other unavoidable Accidents, but the Court has now at last been of Opinion, upon both Condescendences, that the Respondent's Title of Heir Male, and his Charges of Fraud, are both sufficiently alledged.

VI. If it be doubted whether the additional Condescendence has substantially varied and supported the original one, still it is submitted, that the Interlocutor of the 5th February 1740 was inconsistent with Justice, and the Court ought not so early to have stopt the Respondent short, in the Prosecution of his Claim. The Allegations of Fraud in the original Condescendence were strong and apparently relevant, and ought not to have been so strictly taken. The Decrees of 1756, now appealed against, are such as ought to have been pronounced in February 1740, and it was not necessary for the Respondent to appeal, or to begin *de novo*, and institute another Suit, because the additional Condescendence exhibited in June 1741, with the Interlocutor pronounced in Consequence of it, of the 30th of November 1741, suspending the Proceedings during Charles Ross's Privilege of Parliament, kept the Suit alive, and was a Ground for the subsequent Steps taken in the Cause, and the Decrees lately pronounced; which therefore appear to be as well warranted in Point of Regularity, as they are in Point of Justice.

VII. The Appellant himself has affirmed the Interlocutors, against which he appeals, by his own Acts; for he has not only taken out Commission and Process of Diligence, but has proceeded in Concert with the Respondent to examine Witnesses.

C. YORKE.

FRED^r. CAMPBELL.

Die Jovis 19^o Januarij 1758.

ORDERED & Adjudg'd, that the said Appeal be & is hereby dismissed this House, and that the said Interlocutors therein complain'd of be & the same are hereby affirmed.

Colonel James Lockhart, *otherwise* } Appellant.
Ross

Alexander Ross of Ercalny, Esq;
and his Trustees, David Ross, } Respondents
Writer in Edinburgh

The Respondents CASE.

To be heard at the Bar of the House of Lords, on
Wednesday the 18th Day of January, 1758.